

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 585 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and  
MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? No

2. To be referred to the Reporter or not? No

J

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?  
No

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GOVIND FLAISING

Versus

THE STATE OF GUJARAT

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Appearance:

MR MA KALATHIL for Petitioner  
MR.S.R.DIVETIA, LD.PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE S.D.DAVE and  
MR.JUSTICE R.R.JAIN

Date of decision: 16/12/96

ORAL JUDGEMENT

Per: S.D.Dave, J :-

The is the Appeal against the conviction.  
Appellant Govind Rathwa has been convicted for the  
offence punishable under section 302 I.P.C. and under

section 135 of the Bombay Police Act, 1951 and has been awarded the life imprisonment and a fine of Rs. 2000-00, in default the R.I. of two months for the main offence punishable under section 302 I.P.C. For other offence he has been sentenced to the S.I. of one week and a fine of Rs. 50-00, in default the S.I. for two days. This has happened in Sessions Case No. 4 of 1993 which came to be decided and disposed of by the Ld. Addl. Sessions Judge, Vadodara on May 18, 1994.

The case of the prosecution is that, on January 22, 1992 the S.T. Bus had come to village Syedivasan under the Chhota Udepur taluka of Vadodara district, in which prosecution witness No. 10 Shantilal was allegedly travelling in the company of the deceased Jetiabhai. Both Shantilal and deceased were sitting on the seats situated in vicinity. The appellant accused Govindbhai was also travelling by the very same bus and when the bus had reached near village Syedivasan, according to the case of the prosecution, the appellant accused had assaulted upon the deceased by Paliya which he was having with him. It appears that, more than one injuries came to be inflicted by the Paliya and later on as a result of these injuries the deceased Jetiabhai had died. Shantilal PW-10 who was present according to the prosecution in the bus at the relevant time had gone away. Later on he had gone to his village known as Kutabi and had informed the Police Patel, who in his turn had prepared an Occurrence Report and thereafter they had gone to the concerned police station. The F I R came to be registered and the offences having been registered against the appellant accused, the investigation had started. It is the case of the prosecution that, during the investigation, the blood stained garments of the accused and the blood stained weapon, namely the Paliya came to be recovered by the police, and later on the same had shown the presence of the human blood of the group belonging to the deceased. The appellant accused came to be charge sheeted for the alleged commission of the above said offences. Before the Ld. Addl. Sessions Judge the appellant accused had denied the charge at Exhibit-3 and had claimed to be tried. Placing reliance upon the prosecution evidence the Court below has come to the conclusion that the said Offences were duly proved by the prosecution. Hence the above said judgment of conviction and sentence, which is in challenge before us in the present Criminal Appeal.

Ld. Counsel Mr. Kalathil who appears for the appellant accused urges that, the important eye witness has not been examined by the prosecution and that, the

evidence brought on record hardly inspires confidence. According to the learned counsel, no reliance whatsoever could be placed upon the discovery and/or recovery evidence because the panchas have not supported the case of the prosecution in this respect, and therefore even if the Forensic experts opinion leans in favour of the prosecution, no reliance whatsoever could be pleased upon the same. By way of reaction in this respect, learned Govt. Counsel Mr. Divetia urges that the prosecution has been able to establish the charges levelled against the accused beyond all reasonable doubt and that, the evidence of atleast complainant and two witnesses is most convincing and that, there is absolutely no reason not to place reliance upon the said evidence.

With a view to appreciate the rival contentions, we would like to begin with the evidence tendered by the Investigating Officer Hematsingh P.W. 11 Exhibit-45. During the cross examination the I.O. has stated that, during the investigation it was a known fact that so many people were informed regarding the incident by one Sankarbhai. According to him, it was revealed that Sankarbhai was the eye witness. Despite this knowledge the I.O. has said that he had not cared to record the statement of the said eye witness Sankarbhai, whose name as an eye witness had surfaced during the investigation with a further fact that, there was convincing evidence to come to the conclusion that Sankarbhai had furnished the information to many village people. When the statement of Sankarbhai could not be recorded at the stage of investigation, necessarily his evidence has not been made available to the Court below. According to us, this creates complication and hurdle in the way of the prosecution. We feel that the evidence of the best person, namely Sankarbhai has not been brought forth before the Court.

After having appreciated the above said aspect coming from the evidence of Hematsinh Vala, PW-11, our concentration should be on three witnesses, including PW-10 Shantilal Temaria at Exhibit-27. It is the case that Shantilal and deceased were travelling in the very same bus and that, Shantilal was the eye witness to the incident. We have noticed, as indicated above that, though it was revealed during the investigation that Sankarbhai was the eye witness, the investigating agency has even not cared to record his statement. The same is the position in respect of many other passengers numbering about 50 who were travelling in the bus at the relevant time. Their statements have not been recorded and naturally their testimony has not been made available

to the Court below.

There was an endeavour on the part of Ld. Govt. Counsel Mr. Divetia to urge and establish that, there is absolutely no reason not to place reliance upon the testimony of PW-10 Shantilal. This witness says that on the relevant day he was travelling by ST bus and was going towards village Syedivasan from Kawat and deceased Jetia was found to be sitting in a nearby situated seat. His say further is that, Govind had given paliya blows to the deceased and that, the incident had taken place when the ST bus had reached village Syedivasn. According to him, there was hue & cry, not only in the bus but also on the bus stand, and therefore the appellant accused was able to make his escape good. He has identified the appellant accused as a person in the dock as the assailant and the muddamal paliya as the weapon which came to be utilised for the assault upon the deceased. We have noticed earlier that, according to the investigating agency one Sankarbhai was in know of the full details and he had supplied all the necessary material to so many people in the village, but Sankarbhai's statement has not been recorded and he has not been examined as the prosecution witness. Any how, we do not propose to discard the evidence of Santilal on this count alone. The cross examination of the witness would reveal many infirmities. It is his case that he was sitting in the bus and the deceased was sitting on a nearby seat. A suggestion was made to him during the cross examination that, this was not his say before the police at the investigation stage. He has repelled this suggestion, but with the help of police evidence on record, namely of PW-11 Hematsingh Exhibit-45 the defence was able to bring out the material contradiction in this respect. A conjoint reading of the evidence of this witness and the evidence tendered by investigating officer Hematsingh Vala, would go to show that, the witness was absolutely silent in respect of material particulars. His say further is that, the deceased was wearing a read colour head-dress popularly known as 'Fetta'. According to him the blows were given in such a fashion that this head dress also had received the corresponding cuts. Queerly enough no such head dress much less a Fetta of red colour having the corresponding cuts of paliya, has come before the Court. This would go to show that, probably Shantilal Temaria was not travelling in the said bus. We are prepared to say so because of the earlier discrepancy regarding his silence before the police and secondly because of the discrepancy regarding the head dress allegedly to be worn by the deceased. Ld. counsel Mr. Kalathil in view of this

situation has urged that, witness Shantilal cannot be said to be a co-passenger and an eye witness to the incident. This contention coming from the learned counsel for the appellant in our view requires to be accepted. But even if this is not accepted and the case of the prosecution is accepted in preference and it is believed that Shantilal was a co-passenger and was in the bus along with the deceased, then, more complications would arise in the case of the prosecution. Because, his version before the police was that, he and deceased Jetiabhai were the only two persons belonging to village Kutabi. In other words the accused who also belongs to the very same village could not be present in the bus at the relevant time. Therefore, viewing the evidence tendered by Shantilal in any one of the two ways, one has to come to the conclusion that, in any way his evidence does not establish the case of the prosecution. One may have to believe that he was not in the bus as the co-passenger and had not witnessed the incident. Alternatively, one may have to come to the conclusion that, he was in the bus but admittedly the accused was not in the bus.

PW-7 Parvinsinh Pawar has been examined as an important eye witness at Exhibit-21. His say is that, the bus had reached village Syedivasan and at that time he was on the ota of the Primary Health Centre. According to him, as soon as the bus had stopped at the bus stand the passengers had started to run from the same. According to him further, accused Govind also was seen by him alighting from the bus with a paliya. Pravinsinh was conscious that he shall have to explain as to how he would be able to identify Govind. According to him, Govind was found running away from the bus with the muddamal weapon. Probably with a view to explain this situation Parvinsinh has said that, he used to know Govind since many years. He has further stated that he had seen one injured getting down from the bus who had received paliya blows. A suggestion was made to Pravinsinh in the cross examination that, he had never stated before the police that since the inception or since last so many years he was knowing the appellant accused. This suggestion has been repelled by the witness. But the police evidence would make it abundantly clear that no such say is coming from the witness at the relevant time. It is therefore abundantly clear that the say of Pravinsinh at Exhibit-21 that he used to know Govind right from the beginning is clearly an after thought or an improvement, and no reliance could be placed upon this part of his version. If that is done an unanswered question would remain as to how, when he

had never the occasion to see, know or meet Govind he would be able to identify him. Therefore in such a situation it appears to be hazardous to place reliance upon the testimony of Pravinsinh Pawar at Exhibit-21.

Mansing Koli PW-3, whose sworn testimony appears at Exhibit-15 has said that, at the relevant time he was incharge of the bus as the conductor and there were about 50 passengers in the bus. His say further is that, one passenger had given three paliya blows to another passenger and that, the assailant had got down and later on the injured was taken to Kawat Primary Health Centre. He has also said that, he does not know as to who the assailant was, and nobody was caught in his presence as the assailant. Any how in the F I R at Exhibit-16 he had given the name of the accused. Placing heavy reliance upon this part of the say of Mansing at Exhibit-15 and FIR at Exhibit-16, learned counsel for the Government Mr. Divetia has urged that, the name of the accused emerges from the same and therefore there is no reason for us not to believe his say. But during the cross examination the witness had admitted that, he had gathered the name both of the assailant and the injured from the talk which he had with the local people and later on he had included his name in the complaint at Exhibit-16. From this evidence of the complainant it can be said that he had only seen a passenger attacking another passenger and later on the assailant had escaped. What all he has said in his complaint is based upon the information which he had collected from the village people. Necesarily therefore Mansing cannot be said to be an eye witness to the incidence, whose evidecne would connect appellant accused with the injury and therefore the commission of the offence. PW-4 the driver Jayantibhai Prajapati has said in his evidence at Exhibit-17 that, there were about 50 passengers in the bus and that, when the bus had reached village Syedivasan there was a hue & cry in the bus and therefore he had stopped the bus and some of the passengers had ran away from the bus. His say is that, one of the passengers was found to be injured and he was bleeding profusely and later on he was removed to Kawat Primary Health Centre. Jayantibhai says categorically that, the assailant had escaped from the bus and that, he was never arrested in his presecne. Thus it is clear that, after the assault the assailant had escaped from the scene of occurrence and what all the complainant had said in his complaint at Exhibit-16 was based upon the talk of the people who had collected on the spot.

This evidence therefore would go to show that the prosecution has not been able to establish the complicity

of the appellant accused in commission of the crime beyond reasonable doubt.

It was sought to be urged that, the garments on the person of the appellant accused and the muddamal weapon, namely Paliya had shown the presence of the human blood and that also of the group of the deceased. The opinion expresed by the Forensic Expert in this respect was sought to be relied upon heavily by the learned Govt. Counsel. But it is clear that the panch witnesses have not supported the recovery or the discovery of the muddamal garments or the muddamal weapon namely the paliya. If there is no convincing evidence that these articles could be recovered from or discovered by the appellant accused, mere presence of the human blood of common group would not be able fasten the liability on the shoulders of the appellant accused qua the offence.

Regard being had to all this, we feel that the Court below was not justified in coming to the conclusion that the case - qua the crime against the accused was proved by the prosecution. In our view, therefore the present appeal requires to be allowed. The same is hereby accordingly allowed. The judgment of conviction and sentence pronounced by the Court below is hereby quashed and set aside. The appellant accused is hereby acquitted of the offence punishable under Section 302 I.P.C. and under Section 135 of the Bombay Police Act,1951. The appellant accused is behind the bars and therefore he should be set at liberty forthwith, if not required in any other criminal case or proceedings.

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